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Report of the Working Group on the issue of discrimination against women in law and in practice

Summary

In this report, the Working Group examines discrimination against women and girls in cultural and family life. The cultural construction of gender determines the role of women and girls within the family, including in marriage. After analysing the impact of culture and religion on the enjoyment of equal rights by women and girls in society and the family, the Working Group redefines family by incorporating a gender perspective. In reaffirming equality between the sexes and family diversity, it is necessary to apply the principle of women's right to equality in all forms of family law, in secular family law systems, State-enforced religious family law systems and plural systems. After recalling the obligation of States to combat discrimination against women in cultural and family life, the Working Group makes several recommendations, drawing on good practices, for the establishment of true equality between the sexes in cultural and family life.

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Contents

		Paragraphs	*Page*
I.	Introduction	1–2	3
II.	Activities	3–7	3
	A. Sessions	3	3
	B. Country visits	4	3
	C. Communications and press releases	5	3
	D. Commission on the Status of Women	6	4
	E. Other activities	7	4
III.	Thematic analysis: eliminating discrimination against women in cultural and family life, with a focus on the family as a cultural space	8–70	4
	A. The cultural construction of gender	10–22	4
	B. The family: conceptual and sociological aspects	23–36	8
	C. Legal sources of family law	37–61	11
	D. The role of the State in ensuring respect for women and girls' right to equality in cultural and family life	62–70	15
IV.	Conclusions and recommendations	71–74	17

I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolutions 15/23 and 26/5. In chapter II, the Working Group summarizes its activities from the submission of its last report to the Human Rights Council (A/HRC/26/39) until March 2015. In chapter III, it addresses discrimination against women in cultural and family life.

2. The roles of Chairperson-Rapporteur and Vice-Chairperson of the Working Group were carried out by Frances Raday and Emna Aouij, respectively, until January 2015, and then by Emna Aouij and Eleonora Zielinska, respectively.

II. Activities

A. Sessions

3. The Working Group held three sessions during the period under review. At its tenth session, held from 5 to 9 May 2014 in Geneva, it discussed various issues relating to women in cultural and family life with a number of stakeholders, relevant parts of the United Nations Secretariat and other experts. At its eleventh session, held from 10 to 16 October 2014 in Geneva, the Working Group continued its consultations with several stakeholders, including the International Labour Organization and departments of the Office of the United Nations High Commissioner for Human Rights. By way of follow-up to the first meeting it organized in 2013, the Working Group held a seminar on the priority theme of cultural and family life, bringing together several representatives of the regional human rights mechanisms of America, Europe and Africa. At its twelfth session, held from 19 to 23 January 2015 in New York, the Working Group continued its cooperation with its partners, including the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), and with several Member States regarding the establishment of a legal framework for the implementation of the post-2015 development agenda and Beijing + 20. The Working Group consulted experts, academics and NGOs on the next priority theme it will address, namely discrimination against women in the areas of health and safety. It consolidated the information it had gathered to inform the present report.

B. Country visits

4. The Working Group visited Chile from 1 to 9 September 2014 (A/HRC/29/40/Add.1), Peru from 10 to 19 September 2014 (A/HRC/29/40/Add.2) and Spain from 9 to 19 December 2014 (A/HRC/29/40/Add.3). It wishes to thank the Governments of these countries for their cooperation before and during the visits and thanks Senegal, Hungary, the United States of America and Maldives for responding positively to its requests to visit.

C. Communications and press releases

5. During the period under review, the Working Group addressed communications to Governments, individually or jointly with other special procedures mandate holders of the Human Rights Council. Those communications concerned a wide range of subjects falling within its mandate, including discriminatory legislation on nationality, and the legal minimum age for marriage, allegations of forced and/or early marriage, and sexual and reproductive health (A/HRC/27/72, A/HRC/28/85 and A/HRC/29/50). The Working Group

also issued press releases, individually or jointly with other mandate holders, treaty bodies and regional mechanisms.

D. Commission on the Status of Women

6. Alda Facio acted as moderator of a discussion on the realization of the rights of marginalized and disadvantaged women and girls, on 18 March 2015, and participated in other events at the fifty-ninth session of the Commission on the Status of Women.

E. Other activities

7. On 1 September 2014, Frances Raday, the Chairperson of the Working Group, wrote to the President of the Human Rights Council regarding the lack of a reference to gender equality within the family in Human Rights Council resolution 26/11 on the protection of the family. On 3 October 2014, she presented a draft statement on the issue, which was adopted by the Coordination Committee of Special Procedures. On 2 December 2014, she participated in a discussion on national action plans on business and human rights at the United Nations Forum on Business and Human Rights. On 2 and 3 December 2014, Emna Aouij and Kamala Chandrakirana participated in a meeting of experts organized by the Due Diligence Project on the role of the State and the due diligence principle in relation to discrimination against women in cultural and family life. During the period under review, members of the Working Group participated in different activities relating to the Working Group's mandate in their respective regions.

III. Thematic analysis: eliminating discrimination against women in cultural and family life, with a focus on the family as a cultural space

8. The legal rights of women and girls to equality and non-discrimination in cultural and family life, established in 1948 by the Universal Declaration of Human Rights and by international human rights law, are often restricted in national laws and in practice, including in cultural practice. The Working Group emphasizes that, in accordance with international human rights law, States have an obligation to adopt appropriate measures with a view to eliminating all forms of discrimination against women and girls in laws, cultural practices and the family, whether perpetrated by State agents or private actors.

9. In order to prepare this report, the Working Group used responses to a questionnaire received from 32 Member States, as well as studies and research by United Nations programmes and bodies, international human rights mechanisms and other stakeholders that were transmitted to it directly or have been carried out recently on the subject.[1] The Working Group also identified good practices in respect of equality in the family and in cultural life, as required by Human Rights Council resolution 15/23.

A. The cultural construction of gender

10. Culture is a broad concept encompassing all forms of conduct, organization and human behaviour within society,[2] including family, language, religion, philosophy, law,

[1] See www.ohchr.org/en/issues/women/wgwomen/pages/wgwomenindex.aspx.

[2] Committee on Economic, Social and Cultural Rights, general comment No. 21, para. 11.

government, art and sport.[3] Cultural diversity occurs when culture is expressed and develops in different contexts in society. Culture is not a static or unchanging concept, although some States tend to present it as such in order to justify inequality between men and women. This living, dynamic and evolving process[4] permeates all human activities and institutions, including legal systems, in all societies across the world.[5] Viewing culture and beliefs as immutable hinders the realization and development of all human rights, including those of women.

11. The Working Group has taken as its basis the legal framework established by the human rights community regarding the right of women to participate, on an equal footing with men, in creating, contesting and recreating their cultures and in all aspects of cultural life. The equal right of all persons to participate in, access and contribute to cultural life is guaranteed by international human rights law, particularly articles 5 and 13, subparagraph (c), of the Convention on the Elimination of All Forms of Discrimination against Women, article 27, paragraph 1, of the Universal Declaration of Human Rights and article 15 of the International Covenant on Economic, Social and Cultural Rights.

12. The construction of gender is deeply embedded in culture. In its general recommendation No. 28, the Committee on the Elimination of Discrimination against Women indicates that "the term 'gender' refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community."[6]

13. The cultural construction of gender is conducive to generalized discrimination against women in all cultures. Discrimination against women and girls cannot, therefore, be considered an essentialist element, present in certain cultures and not in others. Since cultures are neither homogeneous nor unchanging, there are very significant differences between them concerning their stages of development and the extent to which the patriarchy, misogyny and practices that are harmful to women and girls exist within them.

14. Culture, when understood as a macro concept, also includes religion. Religion constitutes an institutionalized aspect of culture, with its own sources of authority that regulate social behaviour. It is often based on the concept of transcendental authority, and most religions have codified normative systems. Change must be wrought within the religious hierarchy of the community and must conform to the religious dogma of the written sources. As a consequence, religions are often a haven against social and cultural change. In all religions, there are movements that resist any change to the patriarchy and the status of women and girls in the family.[7] Conversely, non-gender-based discriminatory

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[3] Culture is understood here as a macro concept of human behaviour. The issue of women's participation in cultural activities will not be analysed. The Working Group refers to the work of the Special Rapporteur in the field of cultural rights and fully supports the implementation of her recommendations (see A/67/287).

[4] Committee on Economic, Social and Cultural Rights, general comment No. 21, para. 11.

[5] A/67/287, para. 2.

[6] Committee on the Elimination of Discrimination against Women, general recommendation No. 28, para. 5.

[7] Frances Raday, "Culture, religion and gender", *International Journal of Constitutional Law*, vol. 1, No. 4, Oxford University Press and New York University School of Law, 2003, p. 668.

practices, including some previously defended in the name of culture and religion, such as slavery, have been delegitimized or abandoned as values and ethics have evolved.[8]

15. The Working Group notes the vital importance of article 5 of the Convention on the Elimination of All Forms of Discrimination against Women, which requires States to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. This provision establishes a legal basis for the primacy of women's right to equality over discriminatory cultural patterns of conduct, including those stemming from religious edicts.

16. Culture and religion are often invoked to justify discrimination and violent practices against women and girls. Women have often been viewed as objects rather than as equal participants with men in the creation and manifestation of cultural principles. Indeed, when culture and religion are invoked to justify different forms of discrimination against women, women are seen not as victims or survivors of such discrimination, but as persons who "violate" cultural rules and norms.[9]

17. Several United Nations human rights experts, special procedures mandate holders,[10] treaty bodies[11] and the Secretary-General of the United Nations have established that neither cultural diversity nor freedom of religion may justify discrimination against women. Discriminatory, repressive and violent practices against women should be eliminated, whatever their origins, including those founded in culture or religion.[12] The Working Group is convinced that this opinion is crucial to securing women's enjoyment of their right to equality in all aspects of life.

18. The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have noted that harmful practices affecting women and girls are deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles.[13] They highlight the gender dimension to violence and indicate that sex- and gender-based attitudes and stereotypes, power imbalances, inequalities and discrimination perpetuate the widespread existence of practices that often involve violence or coercion. They maintain that the nature and prevalence of these practices vary according to region and culture. These practices cause serious harm to every aspect of the lives of the women and girls who fall victim to them and include incest, female genital mutilation, early and/or forced marriage, so-called "honour crimes", dowry-related violence, neglect of girls, extreme dietary restrictions, virginity tests, servitude, stoning, violent initiation rites, widowhood practices and female infanticide.[14] The obligations set out in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child form the basis for the elaboration of a global strategy to eliminate harmful practices,[15] which should

[8] Due Diligence Project, "The Due Diligence Principle and the Role of the State: Discrimination against Women in Family and Cultural Life", January 2015, p. 6.

[9] Ibid., p. 5.

[10] See A/68/290, para. 30, A/67/287, para. 3, and A/HRC/26/22, para. 13.

[11] Human Rights Committee, general comment No. 28, para. 21; Committee on Economic, Social and Cultural Rights, general comment No. 21, paras. 18 and 64.

[12] Committee on Economic, Social and Cultural Rights, general comment No. 21, para. 19.

[13] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, para. 6.

[14] Ibid., paras. 7 and 9.

[15] Ibid., para. 33.

be well defined, rights-based, have local relevance and comprise legal, economic and social support measures combined with proportional political engagement and State responsibility at all levels.

19. In many contexts, States fail to establish and enforce a clear legal hierarchy based on the guarantees of equality and non-discrimination set forth in international human rights law and national legislation, thus helping to maintain patriarchal modes of organization and behaviours.[16] Even when the law is independent of any religious source, it may be strongly influenced by culture, deriving from dominant ideologies linked to religion, traditional attitudes and social norms. Some States adopt national laws and regulations that restrict the rights, power and mobility of women on the basis of essentialist points of view belonging to a particular culture or religion. Conservative religious extremist movements impose strict modesty codes in order to subjugate women and girls in the name of religion, particularly in situations of political transition or conflict. For example, some branches of Islam have reintroduced forced and/or early marriage and some branches of Christianity prevent women from having access to therapeutic abortion. Religious extremism limits women's rights, including their right to health and economic activity, and they are generally subject to harsh sanctions for crimes committed against the patriarchy, such as adultery. At the international level, many States justify their reservations to articles of several human rights conventions, including the Convention on the Elimination of All Forms of Discrimination against Women, in the name of preserving their cultures and religions. Human Rights Council resolutions 16/3 on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind and 26/11 on the protection of the family threaten to undermine international achievements in the field of human rights in the name of cultural and religious diversity.

20. The Working Group is concerned about the considerable increase in laws and public policies developed to protect culture and religion that threaten the universally established standards on the rights of women. Gender-based stereotypes, often strengthened and legitimized in national constitutions, laws and policies, are justified in the name of cultural norms or religious beliefs. Failure to eliminate these stereotypes leads to the generalization of practices that are harmful to women and girls. The sexist stereotypes present in the media, on the Internet, in audiovisual productions and in video games contribute to the perpetuation of a culture of discrimination and violence against women.

21. Women who do not conform to the gender stereotypes that predominate in some cultures and those who openly contest them, including within their own cultural or religious communities, are particularly vulnerable to discrimination, violence and criminalization. They include, among others, single women, widows, female heads of family, lesbians, bisexual and transgender women, sex workers and women human rights defenders. The Working Group emphasizes that the obligation of States to protect cultural diversity applies to diversity within cultures as well as between them.

22. While gender stereotypes pervade all aspects of human existence, women's rights are at particular risk in the family, which is a locus for the perpetuation of traditional values. The family is a product of patriarchal culture and a vital institution for upholding the patriarchy. The Working Group emphasizes that women's equal rights in the family are closely linked to their rights in all areas of life, including public and political life and social, economic and cultural life.

[16] See A/67/287, para. 3.

B. The family: conceptual and sociological aspects

1. Redefining the family by incorporating a gender perspective

23. The family exists in various forms. The expression "diverse families" encompasses, for example, single-parent families; families headed by women; intergenerational families including, among others, grandparents; families headed by children, such as orphans or street children; families comprising lesbian, gay, bisexual, transgender and intersex (LGBTI) persons; extended families; self-created and self-defined families; families without children; families of divorced persons; polygamous families; and non-traditional families resulting from interreligious, intercommunity or inter-caste marriages. Self-created and self-defined families include, in particular, families formed in marginalized communities. In all these different forms of family, women tend to be subject to legal sanctions and to experience difficult social and economic situations. Indigenous and minority women and women living in strict patriarchal, religious, traditional or caste systems are more likely to be found in these forms of family and are especially vulnerable to early and/or forced marriage, while men may have multiple households or second families with their de facto spouses or partners.

24. The different forms of family and their recognition by the State are influenced by a multitude of normative factors, such as culture, religion and caste, and behavioural factors, such as livelihoods, sexuality and social status. Although several international forums recognize family diversity, including "in different cultural, political and social systems",[17] many of the aforementioned non-traditional forms of family are not recognized by all States. The family is often defined by legal systems as a unit founded on marriage between a man and a woman, affecting rights relating to, for example, inheritance, property, child custody, pensions, tax relief and social service provision. Laws and public institutions in some States require a male family member or male guardian to initiate or conclude official transactions, thus placing families headed by women or consisting solely of women at a disadvantage. Families headed by women, like those headed by children, are more seriously affected by poverty because of the discrimination they suffer. Given that State recognition is often a condition for families to receive services and benefits, such as accommodation and protection provided by the State and/or non-State actors, lack of recognition leads to the marginalization of these families.

25. It is the opinion of the Working Group that the understanding and legal definition of the family in national legislation should be extended to recognize different forms of family. The recognition of same-sex couples, for both women and men, and other forms of family is an example of good practice that a number of States have already implemented. In this regard, the Inter-American Court of Human Rights has confirmed that mothers who are lesbians should not be deprived of custodial rights over their children.[18]

26. However, not all forms of marriage deserve recognition. The Working Group calls for the non-recognition of those forms that discriminate against women and/or fail to ensure equality and justice for women, whatever the legal system, religion, custom or tradition. This refers to, among others, early and/or forced marriage, temporary marriage and polygamy. The Committee on the Elimination of Discrimination against Women and the

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[17] See *Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995* (A/CONF.177/20/Rev.1), Beijing Platform for Action, para. 29; Panel on the protection of the family, 15 September 2014, twenty-seventh session of the Human Rights Council.

[18] Inter-American Court of Human Rights, *Atala Riffo and daughters v. Chile*, judgement of 24 February 2012 (Merits, Reparations and Costs).

Human Rights Committee[19] have recommended that States should prohibit polygamy on the grounds that it contravenes women's right to equality with men and can have serious emotional and financial consequences for women and their dependants.[20] However, there are national civil codes that legalize polygamous marriage, early and/or forced marriage and temporary marriage. The Working Group advocates the repeal of these codes. Among the countries that deem such marriages to discriminate against women and girls, some consider them void and others merely voidable. In all cases, the legal solution must protect the rights of women and girls, who remain the victims of these harmful marriages. Their rights to subsistence, to property, including land and inheritance, to a place of residence, to custody of children and to remarry must be guaranteed.

27. The Committee on the Elimination of Discrimination against Women has recommended the prohibition and annulment of these marriages, which violate the dignity of women, and calls for safeguards and guarantees to protect the rights of women and girls living in such families.[21] Invalidating an early marriage protects the minor spouses by restoring their single status so that they are deemed never to have been married, rather than divorced, and by cancelling all financial or property transactions linked to the marriage.[22]

2. Women's right to equality in the family

28. All legal definitions of the family should include the right to equality, de jure and de facto, of women and girls within the family. Full equality between women and men, and girls and boys, is a requirement of international human rights law and constitutes a right of women that is vital for the well-being of the family and for society as a whole.

29. International human rights law guarantees gender equality in the family, including when marriage is entered into, during marriage and at its dissolution, as set out in article 16 of the Universal Declaration of Human Rights and article 23 of the International Covenant on Civil and Political Rights. Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women establishes the obligation of States to ensure gender equality in all matters relating to marriage and family relations, including in respect of the decision whether to marry, the free choice of spouse, rights and responsibilities as parents, the decision on the number and spacing of children, and personal rights as husband and wife. Similarly, articles 1 to 3 of the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages require States to ensure gender equality regarding consent to marriage, to specify a legal minimum age for marriage and to register marriages.

30. When the rules governing family relations discriminate against women, they violate international human rights law. Furthermore, considerations linked to protecting and strengthening the family may not be invoked to justify forms of family that do not meet the requirement for equality between men and women and girls and boys. The lack of equality in these forms of marriage leads women and girls to experience discrimination, making them vulnerable to domestic violence.

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[19] Human Rights Committee, general comment No. 28, para. 24.

[20] Committee on the Elimination of Discrimination against Women, general recommendation No. 21, para. 14.

[21] Committee on the Elimination of Discrimination against Women, general recommendation No. 21, paras. 14, 16 and 36–39.

[22] Marsha A. Freeman, Christine Chinkin, Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, Article 16, 2012, p. 437.

31. The family is the basic unit of society and, as such, should be strengthened. It is entitled to receive comprehensive protection and support.[23] The family plays a key role in social development and in the growth and well-being of children, including girls. Women and girls' ability to act and participate in the different aspects of life in society derives mainly from respect for their right to equality with men and boys in the family. In this context, the Working Group deems it essential for families to be formed in such a way that women and girls' right to equality is fully recognized, respected, protected, fulfilled and promoted.

32. The Human Rights Council, however, in its resolution 26/11 on the protection of the family, did not reaffirm the right of women to equality in the family. In October 2014, the special procedures mandate holders issued a statement calling on the Council to ensure that the right to equality between women and men, and girls and boys, was included in all future resolutions concerning the family.[24]

33. Several States, in the name of culture or religion, have entered reservations to article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, which requires gender equality in marriage and the family. Withdrawal of reservations to article 16 of the Convention, and also to articles 2 and 5, represents good practice and a vital step towards the establishment of an effective legal framework to protect the rights of women in the family and in cultural life. Morocco and Tunisia have thus recently withdrawn reservations to the Convention, including to article 16. The Working Group shares the opinion of the Committee on the Elimination of Discrimination against Women to the effect that reservations to articles 2 and 16 are incompatible with the object and purpose of the Convention, and it reiterates the importance of States' withdrawing their reservations to these articles, and to article 5, so as to ensure gender equality in cultural and family life. It is the responsibility of States to respect their international commitments and the clear choices they have made regarding the primacy of international legal standards on gender equality over national secular, religious or customary legal standards.

3. Manifestations of discrimination against women in the family

34. The role of women in the family has generally been under patriarchal control in cultures and religions that subject women and girls to forced and/or early marriage and discrimination in a number of areas of family life, such as consent to enter into marriage, dowry obligations, the right to possess and manage property, sexual relations, requirements regarding modesty and freedom of movement, guardianship and custody of children, divorce and division of matrimonial assets, the punishment of adultery, the right to remarry following dissolution of the marriage or death of the husband, the status of widows and inheritance. In addition, women and girls are generally not treated equally in families with regard to the division of rights and responsibilities. Discrimination against women and girls in the family and in marriage affects all aspects of their lives.

35. In many cultures and religions, wives have a duty of obedience, and husbands have the right to punish their wives, including physically. The provision of sexual services by wives is deemed part of their duty to obey their husbands,[25] and marital rape is not prohibited.[26] The Working Group welcomes the introduction of laws criminalizing domestic violence in around 130 countries but finds it regrettable that only 52 countries explicitly

[23] *Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995* (A/CONF.177/20/Rev.1), Beijing Platform for Action, para. 29.

[24] A/HRC/28/41, annex x.

[25] E/CN.4/2002/73/Add.2, para. 124.

[26] In some religions, such as Judaism, marital rape is forbidden.

criminalize marital rape.[27] Domestic violence has a considerable impact on women, causing more deaths than civil wars and entailing much higher economic costs than those linked to homicides or civil wars.[28]

36. In some countries, legislative provisions strengthen patriarchal family structures, as well as the concomitant discrimination and violence against women. This is particularly true of provisions allowing rapists to marry their victims in order to escape legal proceedings and laws that exclude marital rape from the prohibition of rape under criminal law. In some contexts, only men are able to transmit their nationality to their foreign spouses and their children. This de jure inequality has considerable effects on women and their children because the State protection granted by citizenship is refused them de facto.[29]

C. Legal sources of family law

37. Family law may derive from various legal sources in a State, such as constitutions, laws, judicial decisions, and religious and customary codes. However, States are required, under international human rights law, to respect, protect and realize women's right to equality in the family, regardless of the source of family law.

38. National constitutions are generally the supreme law in most States and form the foundation of the State's institutional and legal structures. They also provide the framework for the elimination of discrimination against women. An explicit constitutional guarantee of gender equality is fundamental to combating discrimination against women and girls in law and in practice. Many countries have already recognized and enshrined this principle of equality in their constitutional laws, and it is essential that it apply in all areas of law, including family law.[30]

39. Family law primarily addresses personal status and relations between family members.

40. In addition, secondary family law covers such areas as taxation, social security, retirement benefits, survivors' benefits and the right to family reunification.

41. The three main systems of family law are secular law systems, religious law systems and plural systems.

1. Secular family law systems

42. In most countries, family law is regulated by secular codes that have been established by the State, under civil or common law systems, and have no basis in religious or customary norms. Secular family law was originally patriarchal. The very being or legal existence of the woman was "suspended during the marriage, or at least [was] incorporated and consolidated into that of the husband".[31] Married women had no capacity to conclude contracts or own property and were discriminated against as regards inheritance, divorce,

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[27] UN-Women, *2011–2012 Progress of the World's Women: In Pursuit of Justice*, 2011, pp. 32–34, available from: http://progress.unwomen.org/pdfs/EN_Report-Progress.pdf.

[28] Anke Hoeffler and James Fearon, "Conflict and Violence Assessment Paper", Copenhagen Consensus Center, 2014.

[29] See A/HRC/23/50, paras. 84–86.

[30] UN-Women, *2011–2012 Progress of the World's Women: In Pursuit of Justice*, p. 24.

[31] William Blackstone, *Commentaires sur les lois anglaises* (Commentaries on the Laws of England), 1765, vol. II, translated from the English by N.M. Chompré, Paris, Bossange, Rey et Gravier, et Aillaud, 1822, p. 215.

and guardianship and custody of children. Moreover, women had to pledge obedience to their husbands, and marital rape and corporal punishment were permitted.

43. Reforming family codes is essential to establishing, in national legislation, women's equal status in marriage and the family structure. Two types of process can be observed with regard to the promotion of gender equality in family law.

44. The first process is the elimination of discriminatory laws on the family and the promotion of gender equality within secular law systems. This sort of legal reform took place in some of these systems from the end of the nineteenth century, when many States reformed their laws on the family by separating religion from the State and introducing measures to promote women's equality within marriage and the family, including the right of married women to conclude contracts, own property, inherit, divorce, and have guardianship and custody of children, on an equal basis with men. Secular family law systems thus moved from being patriarchal to adopting a more egalitarian approach, which now represents good practice in ensuring gender equality in the family. A recent example is the Marriage Law in China, as amended in 2001, which nullified all bigamous marriages and all marriages in which one of the parties had not reached the legal minimum age for marriage, repealing traditionalist patriarchal laws on the family and affirming gender equality in the family.[32]

45. The second process is the transition from patriarchal religious family law to a secular family law system that provides for gender equality in the family. Several States where family law was based on patriarchal religious codes have introduced equality for women in the family by revoking religious laws and regulating family affairs under secular codes. In many European countries, family law was based on religious, primarily Christian, laws, and all marriages were thus placed under religious jurisdiction. At the end of the nineteenth century, all matters relating to family were placed under the secular jurisdiction of the State, thereby removing the religious hegemony in this area.

46. In some secular family law systems, elements of discrimination remain, for example a lower legal minimum age for marriage for girls and discriminatory provisions on inheritance rights, divorce and recognition of same-sex couples.

47. Moreover, some secular family law systems allow family matters to be decided in parallel religious or customary law systems, whether formal or informal. The implications for women's right to equality of such systems are discussed in the sections on plural legal systems.

2. State-enforced religious family law systems

48. Several States have no secular family code and regulate personal status either by integrating religious laws on the family into constitutional or legislative provisions or by granting religious authorities or religious tribunals jurisdiction over personal status so that they may apply the family codes derived from the sacred texts. Currently, a large number of States that have Islam as their State religion, such as the Islamic and Arab republics, regulate the personal status of all citizens by applying Islamic law from the Koran and the Sunna. Although the notion of the equality of men and women before the law is often incorporated in their constitutions, some States maintain that this equality does not apply in the case of laws on the family and on marital or personal status. Some States that recognize the legal competence of a majority religion in the State also grant non-majority religions jurisdiction over their own communities of faithful, such as Lebanon (Muslim majority), India (Hindu majority) and Israel (Jewish majority).

[32] See A/HRC/26/39/Add.2, para. 17.

49. Some States that apply religious or customary law to regulate personal status have reinforced the traditional prohibitions on adultery by criminalizing it. Adultery, which is defined as any sexual relation outside marriage, is severely punished and may even result in a sentence of death by stoning in some States that apply Islamic law. The sanctions are generally imposed on the women rather than the men. Interventions by foreign Governments, civil society and special procedures mandate holders have sometimes led to judgements that imposed stoning to be overturned. In some states in the United States of America, adultery between married persons is a crime, but these provisions have not been implemented in the last thirty years. The Working Group issued a statement calling for the decriminalization of adultery[33] and wishes to recall that criminalization of sexual relations between consenting adults is a violation of their right to privacy and an infringement of article 17 of the International Covenant on Civil and Political Rights.

50. Reforms to introduce a measure of equality for women in family law have come about in two different ways in countries where family law was based solely on religious law. The first involves reform based on religious interpretation (hermeneutics). The Committee on the Elimination of Discrimination against Women has argued, in several of its concluding observations, that evolving customs and the variety of possible interpretations of religious law offer potential for progress towards equality, while at the same time encouraging States parties to move in that direction.[34] Reforms of religious family codes, based on interpretations of sacred texts that favour equality, have taken place in some Muslim-majority countries, which have carried out legislative reforms founded on progressive interpretations of sharia. For example, Tunisia was one of the first countries with Islam as the State religion to enact a progressive Personal Status Code guaranteeing gender equality;[35] in 2004, Morocco embarked on a far-reaching reform of its family law, paving the way for significant progress towards gender equality;[36] Tunisia, Turkey[37] and Benin have adopted legislation against polygamy; in Indonesia, Islamic tribunals institutionalized the appointment of women judges in religious tribunals in 1989, thus encouraging more gender-sensitive rulings.

51. The second way to reform patriarchal religious family law involves the replacement of religious family law with secular law. In traditionally Christian States, such as Italy in 1970 and Greece in 1982, civil family codes were introduced to replace religious personal laws.

3. Plural legal systems

52. Plural legal systems are systems in which various laws coexist. They may include various combinations of codified civil law, religious law systems, indigenous or customary legal codes, community arbitration or other dispute settlement procedures. Plural legal systems may be formal or informal. They most often affect personal status law and family law. In States with plural legal systems, the State legal system, which is generally civil and codified, and the State courts address matters relating to the public sphere.

53. Several States have adopted this type of legal system as a way of acknowledging cultural diversity. However, legal pluralism is also used by some actors to promote political

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[33] Statement by the Working Group, "Adultery as a criminal offence violates women's human rights", 2012, available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E.

[34] See Marsha A. Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women. A Commentary*, 2012, p. 439.

[35] See A/HRC/23/50/Add.2, paras. 7–8.

[36] See A/HRC/20/28/Add.1, paras. 18–22.

[37] Turkish Civil Code (1926).

and ideological interests. Approximately 80 per cent of claims or disputes are resolved by parallel justice systems, signifying that most women in developing countries access justice in a plural legal environment.[38] The existence of social, economic, institutional and cultural barriers and the lack of confidence in formal systems may explain the widespread use of these parallel systems. Poverty and a lack of information on accessing formal justice and education are the main factors that lead women to use parallel justice systems.

54. Parallel justice systems apply religious, customary or indigenous laws, which, as shown above, are patriarchal. These systems are mostly dominated by men and therefore tend to perpetuate inequalities and patriarchal interpretations of culture, resulting in discrimination against women. Regardless of whether the law is religious or customary, its provisions are often interpreted differently for men and women. The rulings and procedures of these legal mechanisms generally discriminate against women. Moreover, gender-based violence is seldom punished and is sometimes downplayed by religious or customary law courts.

Formal legal pluralism

55. Legal pluralism is formal when the State, through its constitution, laws or judicial decisions, has granted authority to a religious, indigenous or customary court, tribunal or arbitrator to exercise jurisdiction over personal status matters for women. Such systems are generally recognized in State legislation and some are regulated by the State, which may establish appeals procedures, ensure compliance with State legislation or even provide financial or material support.

56. Good practice in protecting women's right to equality in formal plural legal systems takes several forms. The adoption of constitutional laws that require autonomous courts, tribunals or arbitrators to respect women's right to equality in terms of both women's representation in justice systems and the formulation and application of procedural and substantive rules is a good practice implemented in several States. Since the 1980s, 11 Latin American States have formally recognized indigenous laws and courts in their constitutional laws, requiring the legal systems of indigenous communities to respect and enforce women's rights.[39]

57. The right to appeal, before the State courts, discriminatory decisions of indigenous courts, tribunals or arbitrators is another good practice. The commitment of indigenous women in some countries, such as Mexico and Ecuador,[40] to securing State recognition of parallel systems has enabled them to challenge, in the State system, the discrimination they suffered in indigenous legal systems. Women's participation as legal arbitrators, and also as lawmakers, is needed to draw attention to discrimination and to sensitive subjects such as rape or domestic violence, most victims of which are women.

58. Affirming the primacy of international human rights law and constitutional laws over religious, customary and indigenous laws is a key step towards ensuring women's emancipation and autonomy. Customary, religious and indigenous laws and provisions on family affairs must be consistent with the constitutional norms on equality. To ensure more effective application of the principle of equality, State monitoring and oversight bodies must be put in place, as has been done in Canada, Colombia and South Africa.[41]

[38] International Development Law Organization, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment*, 2013, p. 12.

[39] Ibid., p. 68.

[40] Ibid., p. 77.

[41] Ibid., p. 25.

Informal legal pluralism

59. Jurisdiction is exercised informally when jurisdictional powers are not the result of an express grant of judicial authority by the State. Such jurisdiction is generally not recognized by the State. Such situations may arise when religious, indigenous or customary authority is exercised by judges, arbitrators or other alternative dispute settlement procedures that are not authorized or tolerated by the State and/or of which the State is unaware. These systems operate without oversight by the State, and, while some may have been recognized previously in law, often under former colonial systems, they are now beyond State control.

60. When the State becomes aware of such informal systems, it must put in place oversight mechanisms and procedures for appeals to the State justice system to quash decisions that discriminate against women. The State must make an effort to provide alternatives to these informal legal systems, for example, by rendering the formal State system more accessible.

61. Plural legal systems create complex and confusing legal situations. Various United Nations treaty bodies have sought to show how these systems limit women's enjoyment of the right to equality in their private and public lives, while acknowledging the richness of cultural diversity.[42] Even if there is no special recognition by the State of informal legal systems or formal delegation of functions by the State to traditional chiefs, the State should extend its protection, as referred to in article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.

D. The role of the State in ensuring respect for women and girls' right to equality in cultural and family life

62. The State has an obligation to respect women's right to equality within the family and should eliminate any laws, including customary or religious laws,[43] that discriminate against women and any discriminatory acts carried out by State authorities. The obligation not to discriminate against women is direct and absolute. A State will be in violation of this obligation if it has a law that discriminates against women, regardless of whether its family law system is secular, religious or plural.

63. The State has a direct obligation to protect and respect women's right to equality in all the forms of family law considered above. It is held responsible for any breach of its obligations, including in cases where it has, through its constitution, laws or judicial decisions, assigned jurisdiction over family law matters to a religious, indigenous or customary court, tribunal or authority. Moreover, the State has an obligation to exercise due diligence to guarantee and protect women's right to equality in informal plural legal systems.

64. The State must refrain from adopting laws, policies, measures or regulations that discriminate directly or indirectly against women and girls and must ensure that its officials, and private actors, respect this obligation in all contexts, including those situations where women are most vulnerable (as refugees, migrants or stateless persons, for example).

65. The obligation of the State to protect women and girls' right to equality in the family compels the authorities to prevent discrimination by private actors. Due diligence as a

[42] Committee on the Elimination of Discrimination against Women, general recommendations Nos. 21, para. 13, and 29, paras. 13–14.

[43] Committee on the Elimination of Discrimination against Women, general recommendation No. 21, para. 44.

principle of State action should result in a global model of prevention, protection, prosecution, punishment and redress for acts of discrimination and violence against women in cultural and family life.

66. To prevent any violation in cultural and family life, the State must challenge cultural discourse and cultural norms that discriminate against women and perpetuate structural discrimination, taboos or stereotypes based on gender. Attitudes and behaviours towards women must be changed, and women's access to employment, education and finance, as well as the safety of their homes and children, must be ensured by the State in order to reduce gender inequalities.

67. In terms of protection, the State must set up effective services that respond to women's needs in the short, medium and long term. Risks and factors that may lead to discrimination against women must be identified proactively so that effective interventions may be staged before violations are committed.

68. In the event of violations and discrimination against women, the State has an obligation to investigate and prosecute. The State must take measures to guarantee privacy, confidentiality and safety of victims, and to address women's needs and fears, while ensuring that they are not subject to stigmatization, social ostracism or reprisals. The State must be able to foster confidence in the police and the judicial process, including within plural legal systems. To this end, it must ensure that State bodies and courts systematically apply the principle of equality when interpreting and enforcing the law and that they do so in conformity with international standards. The Committee on the Elimination of Discrimination against Women has pointed out that, where this is not possible, the State is still liable and must take appropriate action.[44]

69. The State has an obligation to punish and to put an end to impunity and excuses or justification that perpetuate gender-based discrimination in cultural and family life. The State also has an obligation to afford redress for the harm suffered by women, including by providing for compensation, restitution, guarantees of non-repetition and even preventive measures.

70. Ensuring access to justice for women and girls who have suffered discrimination within the family or in cultural life is part of the State obligation to protect and respect their right to equality. This access must be guaranteed at the legislative and institutional levels. This means, for example, revising all additional laws that affect family and personal status matters, a process in which women must be involved. Also concerned are auxiliary regulations, including special measures adopted, where necessary, in such areas as taxation, social security, retirement benefits, survivors' benefits, rights relating to nationality and the right to family reunification, to ensure women and girls' de facto equality in the various types of family. Women must take part in the formulation and interpretation of national laws, including those relating to family affairs. At the institutional level, they must be involved, on an equal footing, in policy development and judicial bodies so as to ensure that the principle of equality is effectively applied and that decisions handed down demonstrate respect for gender equality. Improving access to justice for women also requires gender-equality training for State authorities and non-State officials responsible for law enforcement, social services and education and for medical and forensic personnel.

[44] Committee on the Elimination of Discrimination against Women, general recommendation No. 28, paras. 12–33.

IV. Conclusions and recommendations

71. **The cultural construction of gender makes women's subjection to gender-based discrimination and violence appear to be inherent and immutable. The patriarchal family is the product of this construction and the most important social mechanism for its perpetuation. Women and girls' human potential is restricted in families. The recognition that women's rights are human rights and that they are universal and indivisible has laid bare the adverse impact of this gender construction on women and girls in families and communities. The need for a paradigm shift has been clearly set out in international human rights law, which, since 1948, has established women's right to equality in all spheres of life, in culture and in the family. As Eleanor Roosevelt said as far back as 1958: "Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. [...] Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere."**[45]

72. **The State must act as an agent of change as regards women's place in cultural and family life, by fostering and creating a culture free of all forms of discrimination against women.**[46] **A transformative approach to women and girls' status in the family is crucial. There needs to be awareness that, in the past, a patriarchal concept of family pervaded all secular, religious, customary and indigenous laws and institutions and that some States and groups are now trying, in a retrograde manner, to subject women to the most oppressive forms of patriarchy, particularly in the context of religious fanaticism. It should also be understood that the transition towards equality between women and men, and girls and boys, in the culture and in the family is a prerequisite for a decent society.**

73. **The Working Group recommends that States:**

(a) Establish a national legal framework recognizing gender equality in cultural and family life, in accordance with regional and international standards:

(i) Recognize and enshrine, in their constitutions and laws, the right to equality, which should apply in all areas of life and have primacy over all religious, customary and indigenous laws, norms, codes and rules, with no possibility of exemption, waiver or circumvention;

(ii) Promote access to, participation in and contributions by women to all aspects of cultural life, including the definition, creation and interpretation of cultural and religious norms and practices, by providing equal resources, adopting special measures and policies, and facilitating women's access to decision-making positions and policymaking processes, at all levels;

(iii) Develop national strategies to eradicate cultural practices that discriminate against women and girls, as well as gender stereotypes, through awareness-raising campaigns, educational and informational programmes and stakeholder mobilization. Engage men, as appropriate, in prevention and protection efforts in respect of gender-based discrimination and violence;

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[45] Eleanor Roosevelt, "In Our Hands" (speech delivered on 27 March 1958 on the tenth anniversary of the proclamation of the Universal Declaration of Human Rights) in *ABC: Teaching Human Rights – Practical activities for primary and secondary schools*, United Nations, New York and Geneva, 2004, p. 11.

[46] A/67/287, para. 5.

(iv) Develop effective mechanisms to combat the multiple and intersecting forms of discrimination suffered by all marginalized women, including minority women, women living in poverty, women with disabilities, refugee and displaced women, migrant and immigrant women, rural women, indigenous women, older women and single women;

(b) Promote a culture free of discrimination:

(i) Establish an executive body that applies the due diligence framework (prevention, protection, prosecution, punishment and redress), addressing all forms of discrimination against women in cultural and family life, including by non-State actors;

(ii) Reject any cultural or religious practice that violates human rights and the principle of equality or prevents the establishment of an egalitarian society free of gender-based discrimination;

(iii) Punish institutions, State officials and non-State actors whose actions threaten women's rights, even where the grounds for such actions are the preservation of culture and religion;

(c) Guarantee women's de jure and de facto right to equality in family diversity:

(i) Recognize and protect, in their constitutions and laws, all forms of family, and affirm and protect women and girls' right to equality in family diversity, by adopting and implementing appropriate measures to protect women from exploitation and discrimination in diverse families, particularly women living in vulnerable situations;

(ii) Eliminate in law and in practice all forms of marriage that restrict and/or deny women and girls' rights, well-being and dignity, including early and/or forced marriage, polygamous marriage and temporary marriage;

(iii) Establish appropriate solutions, remedies and redress to ensure respect for the rights and well-being of women and girls living in the forms of marriage referred to above, including the possibility for them to leave such marriages with their share of the matrimonial assets, custody of their children and the right to remarry;

(iv) Eliminate all laws or practices that restrict the rights and opportunities of widows or divorced women, but not widowers or divorced men, to remarry, work, have guardianship or custody of their children, and own the family home, assets and land;

(v) Repeal all laws that support the patriarchal oppression of women in families, such as laws that exclude marital rape from the crime of rape, laws that grant pardon to rapists who marry their victims and laws that criminalize adultery;

(vi) Prohibit and punish domestic violence, including incest and marital rape, and provide measures to protect women and girls who are victims of such violence, such as protection orders and shelters;

(vii) Respect, protect, fulfil and promote the right to gender equality in the family in the various types of legal system – secular family law systems, State-enforced religious family law systems and plural legal systems. The adoption of a family code or personal status laws free of any reference to culture or religion is encouraged;

(viii) In countries where several legal systems coexist, establish and implement national mechanisms to ensure the effective implementation of guarantees of equality and non-discrimination between men and women in all areas and at all levels, offering women, especially rural and indigenous women, the possibility of removing themselves from the arbitral authority and jurisdiction of customary institutions. Bring parallel customary, religious and indigenous law systems into line with international human rights law, particularly in respect of gender equality, while acknowledging the importance of the wealth and diversity of culture and traditions. Grant women the right to appeal, in State courts, decisions of religious, customary or indigenous authorities, whether formal or informal, that have violated their right to equality;

(ix) Make the formal State legal system accessible to all women, regardless of their social status, and address the shortcomings of the formal system. Formal justice should be preferred to informal justice for the settlement of all family matters, including those relating to sexual violence and domestic violence;

(x) Set up gender-awareness training for all State civil servants involved in education, health, social services, law enforcement and judicial decision-making. Include women, on an equal basis, in all bodies that interpret and apply family law;

(d) According to general recommendation No. 29 of the Committee on the Elimination of Discrimination against Women, the family is a social and legal construct and, in various countries, a religious construct. It also is an economic construct. The Working Group recommends that States:

(i) Take measures to ensure that families allow girls to access education on an equal basis with boys, by raising awareness in the community and providing families with financial incentives to allow girls to finish their studies;

(ii) Ensure that women are free to participate in economic activities outside the house or village, without the supervision of male relatives;

(iii) Ensure that women, on an equal footing with men, and girls, on an equal footing with boys, have the right to at least half the family property and inheritance in the event of divorce or widowhood. Facilitate the invalidation of any waiver of these rights obtained from a woman as a result of pressure from her family or community;

(iv) Recognize the right of women living in polygamous marriages to end their marriage when their husband takes another wife and grant them a share of the family property, including the value of the house or land;

(v) Recognize women as heads of family on an equal basis with men so that they may enjoy the same financial or social benefits;

(vi) Assess, quantify and take account of the impact of women and girls' status in the family in all poverty-reduction policies.

74. The Working Group recommends that international and regional human rights mechanisms:

(a) Develop standards, principles and guidelines to combat all forms of gender stereotype, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women;

(b) Conduct empirical studies on family diversity and the strategic implications of protecting human rights for the family and for all its members, on an equal basis;

(c) Explore the establishment of an essential framework of minimum legal protection for all types of family, including self-created or self-defined families, that would guarantee women's fundamental rights in the family, in accordance with international law.